No. 73-640

In the Supreme Court of the United States

DWIGHT GEDULDIG, APPELLANT,

v.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

DWIGHT GEDULDIG, APPELLANT,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARMILLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

WILLIAM A. CARNEY,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel (Act'g),

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
BETH L. DOE,

Attorneys,
United States Equal Employment Opportunity Commission,
1800 G Street, N.W.,
Washington, D.C. 20506,
343-6254

No. 73-640

In the Supreme Court of the United States

CONTENTS

	Page
Statement of Interest	1
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Question Presented	4
Statement	4
Summary of Argument	5
Argument	6
I. The exclusion from benefits of the period of disability due to pregnancy, while paying benefits for all other forms of disability constitutes discrimination based on sex	6
II. The State has offered no valid justification for the sex discrimination involved in denying benefits to women for disability caused by pregnancy	13
A. None of the non-financial considerations offered by the State Justify the Discrimination Against Women Resulting from the Denial of Benefits During A period of disability caused by pregnancy	15
B. Increased Cost is not a valid Justification for discrimination: Any Financial Problems that may arise can be dealt with in a nondiscriminatory fashion	19
Conclusion	24

CITATIONS

Cases:

Aiello v. Hansen, 359 F.Supp. 792 (N.D. Cal.)	2
Bartness v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied sub. nom. Drewrys Limited U.S.A. Inc. v. Bartness*, 404 U.S. 939	10
Frontiero v. Richardson, 411 U.S. 677	13
Green v. Waterford Bd. of Education, 473 F.2d 629 (2nd Cir.)	14

Cases—Continued

	Page
Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir.)	15
Heath v. Westerville Bd. of Education, 345 F. Supp. 501 (S.D. Ohio, 1972)	14
Local 189, United Papermakers & Paper Workers, v. U.S., 416 F.2d 980 (5th Cir.)	15
Phillips v. Martin-Marietta Corp., 400 U.S. 542	18
Reed v. Reed, 404 U.S. 71	14, 15
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.)	15
Rogers v. EEOC, 455 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 959	9
Sail'er Inn, Inc. v. Kirby, 485 P.2d 529	18
Skinner v. Oklahoma, 316 U.S. 535	11
Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991	14
Stanley v. Illinois, 405 U.S. 645	14
Sugarman v. Dougall, ___ U.S. ___, 93 S. Ct. Reptr. 2842	14
United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir.)	15
Wetzel v. Liberty Mutual Co., 7 EPD ¶9097 (W.D. Pa. 1974)	11
Memorandum Order of February 20, 1974	17

Miscellaneous:

	Page
California Assembly's Joint Committee on Unemployment Compensation Disability Insurance, Final Report, Assembly Concurrent Resolution 45 (1965)	21, 22
Equal Employment Opportunity Commission Guidelines, Employment Policies Relating to Pregnancy and Childbirth, 29 C.F.R. 1604.10 (1972)	8
Greenwald, Carol, Maternity Leave Policy, New England Economic Review (January/February 1973)	19
Grubb and McCoy, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1971)	7
Koontz, Elizabeth Duncan, Childbirth and Child-rearing Leave: Job Related Benefits, 17 N.Y. Law Forum 480 (1971)	7

Miscellaneous—Continued Page

Senate Report No. 92-415, 92d Cong., 1st Session, p. 5 9

United States Department of Labor, Employment Standards Administration, The Myth and the Reality (April 1973) 13

United States Department of Labor, Women's Bureau, Why Women Work (June 1973) 13

Statutes:

California Unemployment Insurance Code:

Section 2626 ..... *passim*

Section 2626 (amended) ..... *passim*

Section 2626.2 ..... *passim*

Section 2678 3

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. II) §2000(e) *et seq* ..... *passim*

28 U.S.C. §1253 3

In the Supreme Court of the United States

No. 73-640

DWIGHT GEDULDIG, APPELLANT

v.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

DWIGHT GEDULDIG, APPELLANT,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARMILLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The issue in this case is whether a state law, providing disability insurance for all workers for almost every disability except the period of disability arising from normal pregnancy, discriminates against women

in violation of the Fourteenth Amendment. The resolution of this issue will have a significant bearing on the implementation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) §§ 2000e *et seq.*, which prohibits discrimination on the basis of sex with respect to the terms and conditions of employment in both the private and public sectors. The Guidelines of the Equal Employment Opportunity Commission (29 C.F.R. 1604.10 (1972)), the agency charged with the enforcement of Title VII, prohibit the disparate treatment of pregnancy disabilities in the employment context as violative of Title VII. A number of law suits are presently pending in which the disparate treatment of pregnancy disability by private employers has been challenged, and in which the employers are attacking the validity of the Commission Guidelines. The decision in this case will influence the decisions in the cases under Title VII since, although the standards for determining unlawful discrimination are not precisely the same under Title VII and the Fourteenth Amendment, they are in many ways analogous.

OPINIONS BELOW

The majority and dissenting opinions of the three judge court below are reported at 359 F. Supp. 792. The denial of rehearing (App. 54–55) is not reported.

JURISDICTION

The judgment of the three judge court was entered June 15, 1973. Rehearing was denied on August 7, 1973. The notice of appeal was filed August 13, 1973.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

STATUTE INVOLVED

California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), at the time of the commencement of this action read as follows:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.[1]

Effective January 1, 1974, the statute was amended and a new § 2626.2 added (Stats. 1973, c. 1026):

> "Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

[1] The only other persons who cannot recover under the statute are those individuals who have been institutionalized as dipsomaniacs, drug addicts or sexual psychopaths. § 2678 provides:

> An individual shall be disqualified from receiving benefits under this part while he is confined, pursuant to commitment or Court order or certification, in an institution or other place, as a dipsomaniac, drug addict or sexual psychopath.

[Section 2626.2]

Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

QUESTION PRESENTED

Whether § 2626 of the California Unemployment Insurance Code, which grants disability benefits for nearly every disability, violates the Equal Protection Clause of the Fourteenth Amendment by denying the same benefits to those women unable to work because of pregnancy-related disabilities.

STATEMENT

The State of California has a disability insurance program described in detail in the opinion below (*Aiello* v. *Hansen*, 359 F. Supp. at p. 794) which is supported by employee contributions, presently fixed at 1% of salary up to a maximum of $85 per year.

Beyond the special treatment of pregnancy, involved in this action, the statute provides coverage up to 26 weeks for all disabilities except for persons institutionalized as dipsomaniacs, drug addicts or sexual psychopaths.

At the time of the commencement of this action, the statute excluded from benefits all pregnancy-related disabilities for a period of 28 days after termination of pregnancy. This action sought to enjoin enforcement of that provision and to require payment of benefits to women with pregnancy-related disabilities. A three judge court held that the law was discriminatory since the effect of pregnancy-related disabilities could not constitutionally be excluded solely because of the additional cost. Judge Williams dissented, finding that the challenged provision was not arbitrary and was rationally related to a State interest.

The statute has been amended, effective January 1, 1974, to cover pregnancy-related disabilities arising from abnormal pregnancies. The question now before the Court, therefore, is whether the statute unconstitutionally discriminates against women by excluding from coverage that period of disability which arises from a normal pregnancy.

SUMMARY OF ARGUMENT

In the employment context a pregnancy-related disability is the same as a disability resulting from any other mental or physical condition. To treat pregnancy-related disabilities differently from other disabilities by excluding them as a basis for disability

insurance benefits is sex discrimination in violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The State of California cannot sustain a defense to such discrimination on the basis of the alleged prohibitive cost involved in covering pregnancy-related disabilities under either the standard of strict scrutiny or that of rational relation.

ARGUMENT

I

THE EXCLUSION FROM BENEFITS OF THE PERIOD OF DISABILITY DUE TO PREGNANCY, WHILE PAYING BENEFITS FOR ALL OTHER FORMS OF DISABILITY, CONSTITUTES DISCRIMINATION BASED ON SEX

The purpose of the California program, as with disability insurance generally, is to cushion the economic effects of loss of income and incurrence of medical expenses which arise from physical inability to work. In relation to that purpose, the effect of pregnancy in the employment context is no different from the effects of any other disability, be it a heart attack or a skiing accident. For a period of time, varying from individual to individual, but usually for a period shortly before the birth of the child until about four to six weeks thereafter, the pregnant woman is physically unable to carry on her normal work. She therefore suffers the loss of income resulting from inability to work. At the same time, she almost always incurs the medical expenses attendant on the delivery of the child and the care required thereafter. Whether or

not pregnancy is deemed a normal biological condition, rather than an illness or an injury, it clearly is, in the employment context, a disability no different in kind from any other disability in relation to the inability of the woman involved to carry on her normal work and earn her normal wages.[3]

Under the California statute nearly all disabilities—including voluntary cosmetic surgery, non-institutionalized alcoholism, injuries resulting from drunken driving or driving under the influence of drugs, and injuries received in an attempted suicide—are covered and a person so disabled can collect benefits from the fund.

Only the period of disability resulting from pregnancy is not covered. Pregnancy is, of course, a condition peculiar to women. When, therefore, the State covers in its insurance plan all disabilities, voluntary or involuntary, to which a worker may be subject, except the one disability peculiar to women, it is inevitably discriminating against women because of their sex. This becomes clear when a different situation is considered. If an insurance policy covered every disability except that arising from sickle cell anemia, a disease with particularly high incidence among blacks, such a policy, although neutral on its face, would re-

[3] Pregnancy-related disability shares the same characteristics as other disabilities: loss of income, medical expenses, hospitalization, and possible death. *See* Childbirth and Child Rearing Leave: Job-Related Benefits, Elizabeth Duncan Koontz, Dir., Women's Bureau, U.S. Department of Labor, 14 *N.Y. Law Forum* 480, 483 (1971). *See also* Grubb and McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260 (1971).

sult in disparate treatment of blacks. Whether that policy could or could not be justified on the basis of other considerations would be a matter to be determined under appropriate standards. But even if found valid, this would not alter the fact that the plan did single out blacks for separate treatment. So here, a program which covers every form of disability, voluntary or involuntary, but does not cover pregnancy, treats women differently because of their sex. That difference in treatment may or may not be justified—a matter we discuss *infra*. It is, however, important, for the purposes of proper analysis, to recognize that the singling out of pregnancy as a basis for denying benefits does amount to sex discrimination *per se*.

The recognition that the denial of benefits for a disability peculiar to women amounts to sex discrimination is the basis of the E.E.O.C. guidelines on this subject. Those Guidelines, "Employment Policies Relating to Pregnancy and Childbirth," 29 C.F.R. 1604.10, 37 F.R. 6835 (1972) provide:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of sick leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and pa-

ment under any health or temporary disability insurance or sick leave plan, formal or informal shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The brief of *Amicus*, General Electric, argues that since the Guidelines were not issued until 1972, when Title VII was enacted in 1965, the Guidelines should not carry any significant weight. This contention ignores the fact that the Guidelines evolved as perceptions of what constituted employment discrimination altered when various specific problems received closer attention. Both the Congress [3] and the Courts [4] have

---

[3] *See* remarks of Senator Williams contained in the Senate Committee Report to the Equal Employment Opportunity Act of 1972 amending the 1964 Act:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . Experience has shown this view to be false. Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of systems and effects rather than simply intentional wrongs . . .

In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (Emphasis supplied). (Senate Report No. 92-415, ~~Calendar No. 412, p. 5~~). 92d Cong., 1st Sess., p. 5).

[4] *See Rogers v. EEOC*, 454 F. 2d 234, 238 (5th Cir. 1971, *cert. denied*, 406 U.S. 959):

"Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nu-

recognized this to be the case. The Commission carefully scrutinized both employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women. The fact that the Commission did not issue its Guidelines immediately cannot abrogate those rights already enforceable under the Act. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied sub. nom. Drewrys Limited U.S.A., Inc., v. Bartmess*, 404 U.S. 939 (1971).

None of the considerations offered by the State as a basis for singling out pregnancy related disabilities for denial of benefits serves to counter the position that such singling out is sex discrimination. All the alleged justifications offered by the State—the alleged voluntariness of the pregnancy state, the ability to anticipate the period of disability, the alleged failure of a large portion of the women to return to the job market—do not alter the fact that, in its relation to employment, the disability due to pregnancy is not different in kind from the disability due to any other

---

ances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues."

" . . . [T]he modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse."

physical inability to work. None of the justifications alleged are peculiar to pregnancy alone.

The State argues that pregnancy is voluntary[1] and therefore, unemployment due to pregnancy is voluntary and not a proper basis for disability insurance. It is the Commission's position that, while in some instances the timing of pregnancy may be voluntary, pregnancy *per se*—the procreation of the species—is not. As stated in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.

As Judge Weber recently said in *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 EPD ¶ 9097 (W.D. Pa. 1974):

> Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in . . . [the] argument that it may be excluded

---

[1] Pregnancy itself is many times not voluntary both because of a couple's religious convictions and because there is not at this time a completely certain method of contraception. Further, many women, for health reasons, cannot use either "the pill" or an IUD.

Amicus, General Electric, on p. 8 of its brief, argues that abortion is a means of avoiding pregnancy. Clearly this is not true. Abortion terminates a pregnancy; it does not stop one from occurring. What the *Amicus* seems to be implying is that a disability program should pay for the termination of a pregnancy and, because of this option, forces a woman to choose between motherhood and employment. This would be unconstitutional. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.

from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity.

Further, the statute does not treat all allegedly voluntary disabilities equally. Many periods of disability, including operations for cosmetic surgery, are wholly voluntary. Others, such as conditions caused by drinking or smoking or accidents caused by skiing, are voluntary in the sense that the choice of life style gives rise to the disability. Even if pregnancy be considered voluntary, the State discriminates against women by covering some voluntary disabilities but not those peculiar to women. Similarly the argument that pregnancy should not be covered because it may be anticipated does not render the policy non-discriminatory. Not every pregnancy is planned. Moreover, planned or not, this is not a condition peculiar to pregnancy. Many operations, even if not voluntary, can be anticipated and planned for in advance.

Nor is it inherent in pregnancy disability that the woman will not return to the work force. By the State's own figures, 50% do return. Moreover, other conditions, whether they result in death or permanent disability, result in the removal of the worker from the work force. Thus the plan is not geared to return to the work force.

The incidence of these various considerations may or may not be greater with respect to pregnancy and may or may not be justification for disparate treatment of pregnancy-related disabilities. It is, however, important, in considering the legal effect of such

alleged justifications, to realize that they are just that—attempted justifications for sex discrimination. They are not considerations which refute the concept that the singling out of pregnancy disability for denial of benefits is discrimination based on sex. A woman who cannot work because of pregnancy loses her earnings and incurs expenses just as much as anyone who cannot work because of some other physical injury.[8] To treat her disability differently than others is discrimination based on sex.

II

THE STATE HAS OFFERED NO VALID JUSTIFICATION FOR THE SEX DISCRIMINATION INVOLVED IN DENYING BENEFITS TO WOMEN FOR DISABILITY CAUSED BY PREGNANCY

Once it is recognized that the pregnancy exclusion does amount to discrimination against women, the arguments offered by the State and by those filing briefs in its behalf can be evaluated in their true light—as justifications for discrimination. Under established law one of two standards would apply. If sex is deemed a suspect classification—as we think it should be for the reasons articulated by four justices in *Frontiero v. Richardson*, 411 U.S. 677, then the dis-

[8] Nearly two-thirds of all women who work do so because they must—either they are alone or their husbands earn less than $7,000 a year. United States Department of Labor, Women's Bureau, *Why Women Work* (rev. ed. 1972). A publication of the United States Department of Labor, Employment Standards Administration, April, 1973, entitled *The Myth and the Reality*, shows the ties between working women and today's labor market.

crimination is subject to strict scrutiny and can be justified only by showing a compelling state interest. As this court recently stated in *Sugarman v. Dougall*, ___ U.S. ___, 93 S. Ct. Reptr. 2842, in order to justify a suspect classification, the State has the burden of showing that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest". The State in this case has not met that burden.

A less stringent standard was that applied in *Reed v. Reed*, 404 U.S. 71, 76. "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." The Court below correctly interpreted *Reed*[7] as holding that classifications which are based on stereotypes rather than reason are to be rejected.[8]

The State is stereotyping pregnant women and not judging them on an individual basis. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198. (7th Cir.) *cert. denied*, 404 U.S. 991. *See Heath v. Westerville Bd. of Education*, 345 F. Supp. 401 (S.D. Ohio). Not only

[7] The District Court adopted reasoning enunciated in *Green v. Waterford Bd. of Education*, 473 F. 2d 629, 633 (2d Cir. 1973) "that *Reed* is probably only one of several cases that mark a general shift in the "rational basis" test to a standard 'slightly, but perceptively, more vigorous.'" 359 F. Supp. at p. 706.

[8] *See Stanley v. Illinois*, 405 U.S. 645 and *Heath v. Westerville Bd. of Education*, 345 F. Supp. 501 (S.D. Ohio 1972).

does the State stereotype pregnancy, but it generalizes on the length and severity of pregnancy-related disabilities, and labels all new mothers as malingerers.*

A. NONE OF THE NON-FINANCIAL CONSIDERATIONS OFFERED BY THE STATE JUSTIFY THE DISCRIMINATION AGAINST WOMEN RESULTING FROM THE DENIAL OF BENEFITS DURING A PERIOD OF DISABILITY CAUSED BY PREGNANCY

The State offers a number of considerations which it claims justify the disparate treatment of women resulting from the exclusion of benefits for the period of disability due to pregnancy. None of these justify the discrimination involved, even under the lesser standard of *Reed v. Reed, supra.*

1. As discussed above, pregnancy-related disability is no different from any other disability so far as it relates to the objectives of a disability insurance pro-

---

*Under Title VII, there are two justifications for sex discrimination. One is the statutorily created test of bona fide occupational qualification, which does not apply here. The other is the judicially created defense of business necessity. The employer has the burden showing that the challenged practice is essential to the safety or efficiency of its operation. *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir.); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir.); *Local 189, United Papermakers & Paper Workers v. U.S.*, 416 F.2d 980 (5th Cir.). As stated in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.) ". . . The challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . ." (emphasis added.) The justification for discrimination under this standard would be even stricter than under the Fourteenth Amendment.

gram to compensate for the loss of earnings and medical expenses incurred during such period. For those women who work because they must—the majority of working women—the period of disability due to pregnancy represents a period of economic need as great, if not greater, than any other period of disability for men and women.

2. For the reasons discussed above, pregnancy cannot be deemed voluntary. Moreover, the California system does not make a distinction between voluntary and involuntary disability. A system which pays for all voluntary disabilities, including cosmetic surgery, cannot justify discrimination against women because the period of disability can be said to have elements of voluntariness.

3. The fact that, even if involuntary, the period of disability can be anticipated and planned for is not a valid reason to discriminate against women. Many conditions which require surgery, including conditions peculiar to men such as a prostate operation, can be planned for in advance.

4. The State claims (Ap. Br, 20) that it is proper to distinguish pregnancy-related disabilities from other disabilities because such claims will tend to be for periods longer than the actual inability to work. There is, however, no assertion by plaintiffs in this action that the State is under any obligation to pay for a period beyond that of actual disability. The fact that some women may attempt to get benefits to which they are not entitled is hardly a reason to deny benefits to those women to whom they are legitimately due. Cali-

fornia states that the claims for disability due to pregnancy have been averaging 15 weeks since the decision below. A claim does not necessarily mean a grant of benefits. If there is a problem with claims that go beyond the period of disability, the problem should be handled directly, by making clear to the doctors of California that certifications of disability must be based on actual physical disability, and not on other considerations. Certainly, as the District Court found, the implication of the State's argument—that pregnant women have a greater tendency to malinger—is without any basis in fact. As the district court said in *Wetzel v. Liberty Mutual Ins. Co.*, No. 72-169, (W.D. Pa.) Memorandum Order of February 20, 1974:

> The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. As a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable symptoms the Court sees no basis for assigning the tendency to malinger as a sex-related characteristic.

5. The State argues that pregnancy is legitimately excluded from its disability program, which is related to the work force, because 50% of working women do not return to work after the birth of a child. But the fact that some women do not return to the work

force as soon as they are physically able to do so[10] is not a valid reason for denying benefits to those who do return as soon as they can, most of them because they need the money. As with exaggerated claims, the way to handle the problem, if indeed it is a problem, is to attack it directly. The State could, if it deemed it desirable, adopt some plan which would make certain that those who do not return to the work force would not be compensated. It should be noted in this connection that the State has no provision for withholding benefits from anyone who does not return to the workforce. Permanent disability and death prevent other workers from returning to the work force. Disability benefits are not denied to such persons.

6. The State also claims that benefits for pregnancy may legitimately be denied because women as a group already receive more money from the disability fund than they contribute. The reason women receive more than they contribute arises largely from the fact that they earn less than men.[11] In any event, as the court below pointed out, the state system is not operated on an actuarial basis. A policy which is discriminatory against some women on account of their sex cannot be justified on the ground that it is not discriminatory against all women. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542.

---

[10] As noted in the brief of Appellees (pp. 71–76) an increasingly large percentage of women do return to the workforce after a more extended period of absence.

[11] *See Sail'er Inn, Inc.* v. *Kirby*, 485 P.2d 529, 541 n. 19 which quotes the study of the President's Task Force on Women as to the lower earnings of women.

B. INCREASED COST IS NOT A VALID JUSTIFICATION FOR DISCRIMINATION: ANY FINANCIAL PROBLEMS THAT MAY ARISE CAN BE DEALT WITH IN A NON-DISCRIMINATORY FASHION

The main justification for excluding disability due to pregnancy, advanced by the State and *Amici*, is the increased cost of including pregnancy-related disability in the program. In our view, the cost factor has been greatly exaggerated. Moreover, if it should prove to be a problem, it could be handled in ways that do not discriminate against one group of women. Since, as we have shown, the exclusion of pregnancy-related disability from the State's program is discriminatory, the State has the burden of proving, by facts, and not by speculation, that the cost is so overwhelming that it justifies the discrimination. This it has not and cannot do.

1. Much of the State's speculation as to increased costs is based on its assumptions that women will obtain benefits for periods beyond the period of actual disability. This immediately casts doubt on its estimate of costs.

A recent study indicates that, if disability benefits for pregnancy are limited to the period of actual physical disability, the impact on overall costs would not be great. Greenwald, "Maternity Leave Policy," *New England Economic Review*, January/February 1973. The article addresses itself to the question of the increase in labor costs of the Federal Reserve Bank of Boston had it followed the Commission Guidelines and paid its female employees sick leave and disability benefits during disability due to preg-

nancy. The period studied was from January 1971 to August 1972. Approximately 30% of the Bank's employees during this time were women under the age of 34. Bank employees accumulated sick leave at the rate of 18 full-pay and 18 half-pay days a year, and could accumulate up to 270 full-pay days. Ms. Greenwald used 2 hypotheticals in her study. In Case A, the woman works through her eighth month of pregnancy and then takes leave amounting to 10 weeks. In Case B, the woman uses all her accumulated sick pay—approximately 14–16 weeks.

The study concluded that in Case B the hourly wage costs would have risen 1.2% (4 cents) in 1971 and 0.6% (2 cents) in 1972. In Case A the increase would have amounted to approximately half as much. Ms. Greenwald determined that total labor costs—the labor cost of all employees per worker hour—would have risen 1 cent in 1971 under B and ½ cent per hour under A. In 1972 the increased costs would have amounted to approximately ½ the costs incurred in 1971.

The Greenwald study also reviewed the actual costs incurred by the Bank for sick pay and disability benefits and concluded:

> For men under 35, the costs were 9 cents an hour in 1971, and 8 cents an hour in 1972. For women under 35, these actual medical costs were 10 cents an hour in both years. After liberalizing benefits to include paid maternity leaves, . . . , hourly costs for women under age 35 would have risen in 1971 to 12 cents an hour under assumption A and to 13 cents an hour

under assumption B. Even in Case B, the cost of these medical payments to women under age 35 would still be less than that to women over 35 and to men over age 55.

2. Even on the State's assumption that benefits will average 13 to 15 weeks, the costs would not disrupt the system. As the District Court noted (App. 11) using the State's own figures, the increased cost could be covered by increasing the contribution rate from one percent to 1.364 percent and by raising the ceiling from $85 to $119.

The California experience under the statute shows that in purpose and practice the disability insurance program has shown itself to be flexible and able to deal with any additional cost involved in including pregnancy related disabilities.[11]

The State did a study of the disability insurance program covering the ten year period from 1956–1965. "Final Report of the Joint Committee on Unemployment Compensation Disability Insurance", Joint Committee on Unemployment Compensation Disability Insurance, Assembly Concurrent Resolution 45 (1965). During the majority of the 10 years the State paid out more than it received. At one point, however, the

[11] It is important to remember, especially in the cost context, that if an employee is being paid his regular pay while disabled, he cannot collect disability pay. Therefore, it follows that any alleged financial burden on the State will be greatly diminished when employers adhere to Title VII and treat pregnancy-related disabilities the same as other disabilities by allowing women to use accumulated sick leave and possibly annual leave as well.

Fund had $141.6 million—more than 2.5 times the total disbursements for that particular year. In order to reduce this amount the State did a number of things: (1) it gave higher benefits to people drawing at less than the maximum rate; (2) it increased hospital coverage from 12 to 20 days for each period of disability; and (3) it raised the additional benefit given to people who were hospitalized from $10 to $12 a day. A number of years thereafter the Fund was faced with the opposite problem and did two things to balance itself. It transferred $70 million from the unemployment fund to the disability insurance fund and it raised the taxable wage base. In 1965 the State again raised the wage base and for the period of August 1, 1965–December 31, 1965 raised the employee contribution rate from 1% to 1.1%. That same year, based on a history of the Department of Employment's borrowing of money to tide the fund over, the legislature passed legislation to refinance the program.

The above examples of flexibility on the part of the State to cope with the changing needs of both the Fund and disabled employees points up very clearly that the system could be made to cope, without discrimination, with any change in the distribution of disability benefits.[12]

The Joint Interim Committee Report states (p. 28):

> The flat-rate contribution principle leads inevitably to the pooled fund, for all practical

[12] One area that might be open to change, since it remained the same from the date of the enactment through the time of the Report, is the basic monetary eligibility requirement.

purposes. Groups of employees, no matter how classified, will vary somewhat from one another in their cost rates. The flat-rate contribution collects more than is needed from some groups of employees in order to pay more to other groups of employees than is contributed by them. This principle, with minor modifications, is deeply embedded in the California system. Its abandonment would require a radical revision of the present financing structure. There appears to be little reason to believe that such a revision is supported by a major proportion of either employers or their employees.

3. There are no doubt other ways in which the State could adjust its insurance program to meet whatever increased costs it experiences. But whatever means it chooses to utilize, the system should operate fairly in favor of all persons similarly situated. As we have repeatedly stressed, pregnancy as a disability is not different from other disabilities, voluntary or involuntary. If the State can show a real, factual justification for treating differently certain types of disability, whether they occur in males or females, which share the same characteristics, a far different question would be presented than the one before this Court. There is no reason why a disability resulting from pregnancy, a disability limited to women, should be singled out for special treatment. To do so is to discriminate against women because of their sex in violation of Title VII and the Fourteenth Amendment.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted.

William A. Carey

WILLIAM A. CAREY,
General Counsel,
JOSEPH T. EDDINS,
Acting Associate General Counsel,
BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
BETH L. DON,
Attorneys,
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
1800 G Street, N.W.,
Washington, D.C. 20506.

MARCH 20, 1974.

I authorize the filing of the above brief.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

*In place of the Solicitor General, who is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1974